UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BELFAST & MOOSEHEAD RAILROAD, et al.,	)	
Plaintiffs	)	
v.	)	*Civil No. 90-0114 P*
PETER DUFOUR, et al.,	)	
Defendants	)	

RECOMMENDED DECISION ON MOTION BY DEFENDANTS TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) and (6) OR, IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS PURSUANT TO FED. R. CIV. P. 12(c)

In this lawsuit challenging the constitutionality of the Maine Railroad Personnel Act, 32 M.R.S.A. ' ' 4140-50, the defendants[1] seek dismissal of the entire case on two grounds: lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. Should any of the claims survive these challenges, the defendants alternatively ask for judgment on the pleadings.

For the reasons enumerated below, I recommend that the court (1) grant the defendants' motion to dismiss claims of Railway Labor Act preemption in Count III for lack of subject-matter jurisdiction; (2) grant the motion to dismiss claims of Railway Labor Act preemption in Count II for

[1] The defendants are James E. Tierney, attorney general of the state of Maine, and members of the Maine Board of Licensure of Railroad Personnel (``Board''): Peter Dufour, Albert Bowen, Ernest Phillips, David Kruschwitz, William Mayo, James McGowan and Stanley Yates. Since the instant lawsuit was filed, Yates' term as a board member has expired. Memorandum in Support of Defendants' Motion to Dismiss Pursuant to F.R.Civ.P. 12(b)(1) and (6) or, in the Alternative, for Judgment on the Pleadings Pursuant to F.R.Civ.P. 12(c) (``Defendants' Memorandum'') at 1 n.2. George Jackson has been named to replace Yates. *Id.*

failure to state a claim upon which relief can be granted; and (3) grant the motion to dismiss, for failure to state a claim, the contention asserted in Count I and reiterated in Counts II, III and IV that drug-testing preemption voids the entire Act. Finally, I recommend denial of the defendants' motion to dismiss as to other claims, and denial of the defendants' alternative motion for judgment on the pleadings.

I. SUBJECT-MATTER JURISDICTION

I focus first on the defendants' challenge to subject-matter jurisdiction, without which this court lacks all power to speak to the issues raised by this case. *See, e.g.*, 5A C. Wright & A. Miller, *Federal Practice and Procedure* ' 1350 at 194 n.2 (1990) (``Wright & Miller"). The defendants identify Counts I and III of the complaint as those in which the plaintiff railroads[2] build non-justiciable causes on fatally weak subject-matter foundations. Defendants' Memorandum at 14-15, 18-19. The court possesses the power, and indeed is duty-bound, to explore its adjudicative authority *sua sponte* when its jurisdiction appears in doubt. *See, e.g.*, 5A Wright & Miller ' 1350 at 202. I therefore carefully consider the justiciability of all five counts of the complaint. The plaintiff railroads bear the burden of proving jurisdiction. *See, e.g., McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Dalman Rodriguez v. Hughes Aircraft Co.*, 781 F.2d 9, 10 (1st Cir. 1980); 5A Wright & Miller ' 1350 at 226. However, the court may review materials submitted outside the pleadings by both the plaintiffs and the defendants. *See, e.g.*, 5A Wright & Miller ' 1350 at 213-17.

[2] The plaintiff railroads are Belfast & Moosehead Railroad, Bangor & Aroostook Railroad, Boston & Maine Railroad, Canadian Pacific Limited, Maine Coast Railroad, New Hampshire Northcoast Corporation, Springfield Terminal Railway, St. Lawrence & Atlantic Railway and Maine Central Railroad.

To summarize the instant case briefly, the plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. ' 2201 that the Maine Railroad Personnel Act (``Act") and accompanying regulations are unconstitutional on grounds of federal preemption and undue burden on interstate commerce. The plaintiffs accordingly ask this court under 28 U.S.C. ' 2202 to enjoin the state permanently from enforcing the challenged Act and regulations promulgated thereunder. The Act requires state licensing of all carmen, conductors, locomotive operators and train dispatchers operating trains within the state of Maine. 32 M.R.S.A. ' 4148. Failure to do so by either employees or railroads is punishable as a Class D crime. *Id.* The plaintiffs aver that the licensing and testing process is under way. First Amended Complaint & 21. Nothing in the record indicates that a single railroad employee or company has been prosecuted for violating the Act; in fact, the state agreed to a 90-day freeze on criminal prosecution commencing June 29, 1990. Defendants' Memorandum at 2 n.3.

Declaratory judgment actions pose difficult questions of subject-matter jurisdiction. Article III of the Constitution constrains federal courts to pass judgment -- including declaratory judgment -- only upon live cases or controversies. U.S. Const. art. III, ' 2; *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937). Such controversies ``must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* at 240-41. ``The difference between an abstract question and a `controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree . . . ." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). ``Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* One challenging a statute must show, at a minimum, ``a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

A. Count I: Preemption by Federal Railroad-Safety Regulation

The plaintiffs allege in Count I of their First Amended Complaint that the Act and accompanying rules are preempted by a pervasive federal railroad-safety scheme encompassing both existing law and proposed rules on licensing of locomotive operators.[3] The defendants request that, to the extent Count I relies on preemption by virtue of proposed rules, the court declare it nonjusticiable. Defendants' Memorandum at 14-15. The proposed rules may never be adopted, the defendants reason, rendering any dispute over them abstract. *Id.* The defendants are correct. The statute that controls the disposition of Count I, 45 U.S.C. ' 434, provides for preemption by federal railroad-safety laws, rules and regulations that have been adopted, not merely proposed. Therefore, the plaintiffs can allege no justiciable preemption case based upon the proposed rules. Nonetheless, the plaintiffs present a colorable claim that federal actions other than the issuance of the proposed rules preempt the Act. That claim is live and ripe for decision.

[3] The plaintiffs reiterate in Counts II, III and IV a specific allegation in Count I that federal law preempts the state's provisions for drug testing. First Amended Complaint && 41, 46, 51 and 57.

Further, the plaintiffs satisfy their burden of demonstrating actual or impending harm.[4] The plaintiffs, like those in *Lake Carriers' Ass'n. v. MacMullan*, 406 U.S. 498 (1972), have been obliged by the challenged statute to take concrete steps toward compliance. The state of Maine, like the state of Michigan in *MacMullan*, coerced that compliance by realistic threat of criminal prosecution. *Id.* at 507-08. As in *MacMullan*, the fact that the state temporarily suspended threat of prosecution is immaterial. The threat was real as of the time the instant case was filed on April 27, 1990. Materials outside the pleadings demonstrate concrete steps toward compliance, including submission of training programs to the Maine Board for approval, training employees, allowing employees time off to sit for Maine's licensing test and in at least one case paying Maine's licensing fees. Deposition of F. Colin Pease (``Pease Deposition") at 33; Deposition of John Law taken September 7, 1990 (``Law Deposition II") at 73-74; Deposition of Robert Onacki (``Onacki Deposition") at 14-20; Deposition of Dana Jewell (``Jewell Deposition") at 8-9; New Hampshire Northcoast's Answer to Defendants' Interrogatory No. 4, Exh. N to Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment (``Plaintiffs' Summary Judgment Memorandum") at 4-5. Accordingly, I recommend denial of the defendants' motion under Fed. R. Civ. P. 12(b)(1) to dismiss Count I.

B. Count III: Preemption by Railway Labor Act

The defendants next question the justiciability of Count III. Defendants' Memorandum at 18-20. In Count III, the plaintiffs assert that the Maine Act and rules are preempted under the Railway Labor Act because they would undermine the railroads' right to hire temporary replacement workers

[4] In so doing, the plaintiffs also satisfy the demands of the well-pleaded complaint rule. Declaratory judgment pleadings that merely anticipate defenses to possible state action do not state cognizable federal claims. *See, e.g., Rath Packing Co. v. Becker*, 530 F.2d 1295, 1304-06 (9th Cir. 1975), *aff'd*, 430 U.S. 519 (1977). Instead, the pleadings must allege harms distinct from that of threatened or

in the event of a strike, First Amended Complaint & 48, and because unions will be aware of these ``substantial impediments," presently altering the balance of economic power, Second Amended Complaint & 49.

Count III poses quintessentially hypothetical questions. Testimony offered by both the plaintiffs and the defendants is abstract. Neither side can come close to agreeing on how the disputed law actually would operate in the event of a strike. The defendants argue that a provision for temporary licenses would render the Maine law's effect negligible, Defendants' Memorandum at 18-20, whereas a witness for the plaintiffs suggests that the state would drag its feet in issuing temporary licenses for political reasons, Pease Deposition at 46. Predictions of ``irreparable financial harm" in the event of a strike, *id.* at 60, are purely speculative. The parties' predictions, however well-founded, leave the court bereft of adequate moorings by which to resolve their controversy.

The plaintiffs' amendment of Count III to allege present harm fails to transform its abstract nature. Dana Jewell testifies that the Maine law has affected labor negotiations but does not ascribe that effect specifically to strike-related concerns. Jewell Deposition at 14-17. Bangor & Aroostook Railroad asserts that the specter of management's difficulties in replacing striking workers because of the Maine law ``provides labor with a potent advantage it has not previously enjoyed and is not in the public interest." Bangor and Aroostook Railroad's Answer to Defendants' Interrogatory No. 4, Exh. H to Plaintiffs' Summary Judgment Memorandum at 3. The statement is conclusory. Materials outside the pleadings simply fail to convey a clear picture of (1) what impact, if any, the unions themselves perceive Maine's licensing law as having in the event of a strike; (2) precisely how those union perceptions have affected present dealings with management; and (3) what actual or imminent harms,

---

actual prosecution. *Id.*

if any, threaten the railroads as a result. Accordingly, I therefore recommend that the court grant the defendants' motion to dismiss claims of Railway Labor Act preemption in Count III.

Given the difficult nature of justiciability issues in this case, I shall now exercise the court's power *sua sponte* to explore its jurisdiction over counts not challenged by the defendants.

C. Count II: Preemption by Railway Labor Act

The plaintiff railroads contend in Count II that the challenged Act and rules are preempted by the Railway Labor Act in that they (1) alter the parties' rights under collective bargaining agreements, First Amended Complaint & 44, (2) will restrict the right of railroad employees based outside Maine to Maine employment, *id.* at & 45, and (3) will force the railroads to distinguish between employees who are and are not licensed by Maine despite any contractual provisions to the contrary, *id.* The second ground for preemption is nonjusticiable; the plaintiff railroads demonstrate no standing to champion the rights of their employees. Nonetheless, the plaintiffs present adequate evidence that the Maine licensing scheme concretely affects their own rights, including the right under collective-bargaining agreements to move employees freely across state lines. Jewell Deposition at 10, 17; Affidavit of F. Colin Pease (``Pease Affidavit'') at & 9; Bangor and Aroostook Railroad's Answer to Defendants' Interrogatory No. 4, Exh. H to Plaintiffs' Summary Judgment Memorandum at 2-3. As a result, I find that portions of Count II alleging harm to the plaintiff railroads' rights, rather than those of their employees, are justiciable.

D. Count IV: Undue Burden on Interstate Commerce

The plaintiffs phrase all alleged burdens on interstate commerce in the future or conditional tense: that the Act ``will require the revision of a vast proportion of railroad operating procedures,''

First Amended Complaint & 53; may force the railroads to change crews at the Maine border, causing the disruption of railroad traffic, *id.*; may force the railroads to change the location of switching yards and the structure of communications systems, *id.*; may force the railroads to revise systems and schedules for inspecting railroad cars, *id.*; may force the railroads to relocate sites of inspection to ensure they are operated by Maine-licensed crewmen, *id.*; and may subject the railroads to ``a multiplicity of conflicting regulations state to state" if other states enact similar schemes, *id.* The plaintiffs must prove that subject-matter jurisdiction existed as of the time of filing the complaint. *See, e.g., Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 251 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982). The complaint thus indicates, and materials outside the pleadings tend to show, that the challenged law imposed no undue burden on interstate commerce as of the time the plaintiffs filed their initial complaint. *See, e.g.*, Onacki Deposition at 24; Jewell Deposition at 15.

Nonetheless, Count IV should not be dismissed for want of subject-matter jurisdiction if the plaintiffs can demonstrate the existence of an imminent, realistic threat of undue burden on interstate commerce. *See, e.g., Babbitt*, 442 U.S. at 298. Witnesses for the plaintiffs paint varying portraits of expected burdens, some of which appear unacceptably distant and blurry. *See, e.g.*, Pease Deposition at 39 (if railroad had emergency in Maine, might not find adequate number of replacement workers licensed in Maine); Onacki Deposition at 29-30 (proliferation of state schemes similar to that of Maine could put a small carrier out of business). This question is close. However, I find sufficient evidence to conclude that the licensing scheme has begun to affect railroad operations in such a way as to realistically threaten, if not already cause, the burdening of interstate commerce. *See, e.g.*, Pease Affidavit at & 9 (railroad incurred a six-hour delay when employee refused to perform substitute job on ground did not have Maine license); Jewell Deposition at 12-13 (trainmen, who are not required to be licensed by Maine law, choosing not to be licensed as conductors, impairing flexibility to move crews

across state lines); New Hampshire Northcoast's Answer to Defendants' Interrogatory No. 4, Exh. N to Plaintiffs' Summary Judgment Memorandum at 5 (time spent on Maine-required training ``dramatically exceeds" the total of only 5.6 hours per year during which New Hampshire Northcoast operates trains in Maine. Railroad anticipates inability to operate on certain days as direct result of Maine requirements.) I therefore find Count IV justiciable.

E. Count V: Ex Parte Young Injunction

The plaintiff railroads concede, with one exception, that Count V, requesting an *Ex parte Young* injunction, presently poses no triable issue. Memorandum in Opposition to Defendants' Motion to Dismiss (``Plaintiffs' Memorandum") at 49-50 n.14. *Ex parte Young* injunctions temporarily enjoin criminal prosecution under allegedly unconstitutional state statutes pending judicial resolution of the constitutional challenge. *Ex parte Young*, 209 U.S. 123, 149, 162 (1908). In the instant case, the state agreed to suspend prosecution for a 90-day period commencing June 29, 1990. Defendants' Memorandum at 2 n.3. The record is barren of any evidence that the state either has extended this period or begun prosecution. The *Ex parte Young* issue remains suspended so long as the state continues voluntarily to refrain from prosecution. However, I do not believe that this count warrants dismissal for lack of subject-matter jurisdiction. The record indicates that, as of the filing of the original complaint on April 27, 1990, the state had not yet agreed to suspend prosecution. The *Ex parte Young* request thus raised a live issue as of the date of filing.

F. Discretion to Provide Declaratory Relief

Even when a justiciable controversy exists, declaratory relief is a matter of discretion. *See, e.g., Hibernia Sav. Bank v. Ballarino*, 891 F.2d 370, 372 (1st Cir. 1989). A declaratory judgment is appropriate when it will ```serve a useful purpose in clarifying the legal relations in issue' or `terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" *President v. Vance*, 627 F.2d 353, 364 n.76 (D.C. Cir. 1980) (quoting E. Borchard, *Declaratory Judgments* 299 (2d ed. 1941)). I conclude that declaratory judgment is an appropriate vehicle through which to resolve the instant dispute. Declaratory judgment will serve the useful purpose of sparing the plaintiff railroads the cost and stigma of having to violate Maine's law in order to test its constitutionality.

II. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The defendants next seek to dismiss the complaint on grounds of failure to state a claim under Fed. R. Civ. P. 12(b)(6). I have recommended that claims of Railway Labor Act preemption in Count III be dismissed for lack of subject-matter jurisdiction, and the parties have acknowledged that Count V is not in issue. I shall therefore confine this discussion to Counts I, II and IV and the portion of Count III asserting that drug-testing preemption voids the entire Act.

Motions to dismiss for failure to state a claim require the court to accept all well-pleaded factual allegations in the complaint as true and to draw reasonable inferences therefrom in the plaintiffs' favor. *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989). The court need not, however, accept as true ``bald assertions" and ``unsupportable conclusions." *Chongris v. Board of Appeals of Andover*, 811 F.2d 36, 37 (1st Cir.), *cert. denied*, 483 U.S. 1021 (1987) (citing *Snowden v.*

Hughes, 321 U.S. 1, 10 (1944)). A court should dismiss a complaint for failure to state a claim only if ``it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (citations omitted). In deciding a 12(b)(6) motion, a court may consider exhibits attached to the complaint. 5A Wright & Miller ' 1357 at 299. I have also reviewed exhibits to the memoranda supporting the motion to dismiss.

The plaintiff railroads in the instant case suggest that the court accept as factual and as true, for purposes of the motion to dismiss, allegations of law. Plaintiffs' Memorandum at 4-6. I decline this invitation. The court need not concede the truth of such legal conclusions in deciding 12(b)(6) motions. *See, e.g.*, 5A Wright & Miller ' 1357 at 315. I particularly hesitate to do so here when, as elaborated below, key areas of law are unsettled.

A. Count I: Preemption by Federal Railroad-Safety Regulation

The search for preemption is fundamentally a search for congressional intent. *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952), *overruled on other grounds*, *Lee v. Florida*, 392 U.S. 378 (1968). The Supreme Court has recognized three avenues by which federal law may preempt state law: (1) Congress may explicitly define its preemptive intent, (2) even absent such specific intent, ``Congress may indicate an intent to occupy an entire field of regulation" and (3) ``if Conngress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law." *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984). State laws that are preempted offend the Supremacy Clause, U.S. Const. art. VI, cl. 2, and on that basis must fall.

Count I, in which the plaintiffs contend that the Maine Act and regulations are preempted by pervasive federal regulation of railroad safety, is best analyzed under the first category of preemption. Congress explicitly addressed the issue in 45 U.S.C. ' 434, which provides in its entirety:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

The defendants concede that the challenged Act and rules do not address a local safety hazard. Defendants' Memorandum at 11 n.6. The critical question thus is whether the Secretary of Transportation, acting through the Federal Railroad Administration (``FRA"), has regulated ``the subject matter" of the challenged state law. Unfortunately, that question is not susceptible of easy resolution. Nowhere in the legislative history provided by the parties is the phrase ``subject matter" explicitly defined. Recourse to the jurisprudence of the First Circuit is similarly unavailing; that court has not had occasion to interpret ' 434. The parties liberally cite to decisions of other courts construing the instant statute. The weight of these cases is diminished by the fact that none confront the precise issue of state licensing of railroad employees. In the absence of more compelling guidance, I have drawn heavily from Fifth Circuit Court of Appeals cases that thoughtfully construe the meaning of the phrase ``subject matter," albeit in other contexts.

The defendants argue for a narrow construction of ' 434, under which preemption would occur only if the FRA adopted regulations covering the precise subject of state law, *e.g.*, regulations

licensing a railroad dispatcher or engineer. Defendants' Memorandum at 11-12. I agree with the plaintiffs that this reading too tightly constricts the meaning of the statute. In two well-reasoned opinions, the Fifth Circuit determined that ' 434 contemplates implied, as well as express, preemption of state railroad-safety law. *Missouri Pac. R.R. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987), *reh'g denied en banc*, 845 F.2d 1022 (5th Cir. 1988) (``MOPAC I") (no implied preemption as to walkways); *Missouri Pac. R.R. v. Railroad Comm'n of Texas*, 850 F.2d 264 (5th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989) (``MOPAC II") (implied preemption as to cabooses). State regulation of cabooses, for example, is preempted not only if the FRA explicitly regulates the subject of cabooses but also if the agency considers the safety aspects of cabooses and affirmatively decides against regulating them. *MOPAC II*, 850 F.2d at 267-68. The Fifth Circuit carefully notes that inaction should be construed as preemptive only if clear expression of agency intent can be found. *Id.* at 267. Simple inattention to the precise issue at hand or rejection of proposed rules for vagueness would not merit preemptive effect. *Id.* Implied preemption ``arises when the policymaker appears to be saying `we haven't done anything because we have determined it is appropriate to do nothing.'" *Id.* at 268.

I join other courts in finding this reasoning persuasive.[5] It accords with Congress' overarching preemptive intent that railroad safety be ``nationally uniform to the extent practicable." 45 U.S.C. ' 434. And it pragmatically acknowledges that, in some instances, the FRA makes deliberate policy

[5] *See, e.g., Burlington N. R.R. v. Minnesota*, 882 F.2d 1349 (8th Cir. 1989) (implied preemption of state caboose regulations); *Burlington N. R.R. v. Montana*, 880 F.2d 1104 (9th Cir. 1989) (same); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149 (9th Cir. 1983) (implied preemption of regulations concerning strobes and oscillating lights).

choices to forgo regulation.[6] Adopting this construction, I find that Count I states a claim upon which relief can be granted and therefore should not be dismissed.

I accept as true, for purposes of this motion, that the plaintiff railroads operate in the state of Maine and are engaged in interstate and/or international commerce. First Amended Complaint && 1-9. These facts allow the inference that the plaintiff railroads are subject to regulation by the FRA and the Maine Board. As the defendants admit, regulations by the Board providing for drug testing of railroad employees are preempted even under their preferred, narrow construction of 45 U.S.C. ' 434. Defendants' Memorandum at 15 n.8. Employing the Fifth Circuit's interpretation, the breadth of the plaintiffs' statement of a claim widens. The defendants insist that the plaintiffs fail to state a claim of implied preemption. Defendants' Memorandum at 13-14. I do not agree. Administrative history reveals that the FRA in 1981 expressed an affirmative policy not to require licensing or certification of any railroad employee. Exh. 2 to Plaintiffs' Memorandum at 17 (report of then Transportation Secretary Drew Lewis to Congress). Following enactment of the Rail Safety Improvement Act of 1988, the FRA reconsidered its position, concluding that certification of locomotive engineers now is necessary, Exh. G2 to Defendants' Memorandum at 50892, and that licensing of dispatchers continues to be unnecessary, Exh. 4 to Plaintiffs' Memorandum at 8. Should the FRA enact final rules on locomotive engineers, such rules would expressly preempt state law. In the meantime, state law on any railroad employee licensing or certification remains impliedly preempted.

B. Count II: Preemption by Railway Labor Act

[6] The Fifth Circuit persuasively argues that its interpretation is buttressed by legislative history. *MOPAC II,* 850 F.2d at 268 n.3.

The question whether the Railway Labor Act (``RLA") preempts state employee licensing appears to be one of first impression; the parties proffer no caselaw on the precise point. The RLA, 45 U.S.C. '' 151-88, contains no explicit instruction as to its preemptive effect. In deciding whether Count II states a claim that the RLA's provisions implicitly preempt state law, I employ the two-tiered preemption analysis developed for the National Labor Relations Act (``NLRA") but applied as well to the similar RLA. *See, e.g., Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, *reh'g denied*, 394 U.S. 1024 (1969). In subjecting Count II to a rigorous review under this analysis, I conclude that it cannot withstand the defendants' motion to dismiss.

Under the so-called *Garmon* strand of labor preemption, I first consider whether the challenged state action contravenes an activity directly protected or prohibited by the RLA. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959) (California court preempted under NLRA from awarding damages for peaceful union picketing). The plaintiffs' argument that the Maine Act does so, Plaintiffs' Memorandum at 40, is unpersuasive. The RLA controls the making of labor agreements and the resolution of disputes arising therefrom. 45 U.S.C. ' 152. The Supreme Court has observed that the RLA neither prescribes nor protects substantive working conditions; ``[i]nstead it seeks to provide a means by which agreement may be reached with respect to them." *Terminal R.R. Ass'n of St. Louis v. Brotherhood of R.R. Trainmen*, 318 U.S. 1, 6 (1943). *See also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 (1985) (noting that plaintiffs had asserted no claim of *Garmon* preemption because the NLRA was silent on welfare-benefit plans). The RLA is silent on the substantive issue of employee qualification and licensing. The statute upon which the plaintiffs greatly rely to prove *Garmon* preemption, 45 U.S.C. ' 431(a), is a safety statute, not a part of the RLA. The plaintiffs therefore fail to state a claim of *Garmon* preemption.

I next must consider whether, under the so-called *Machinists* doctrine, the challenged Maine law regulates activities Congress intended to remain controlled only ``by the free play of economic forces." *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976) (citations omitted). As the defendants in the instant case accurately note, the *Machinists* doctrine prevents the states from regulating weapons used in economic warfare between labor and management, such as concerted refusal to work overtime. *See, e.g., Machinists*, 427 U.S. at 140 n.4, 141, 147; *New York Tel. Co. v. New York Dep't of Labor*, 440 U.S. 519, 530-31 (1979). I accept, for purposes of the motion to dismiss, the truth of the plaintiffs' assertion that the Maine Act presently saps their economic bargaining power. Second Amended Complaint & 49. This would appear to make out a plausible, albeit attenuated, case of *Machinists* preemption, were the inquiry to end here. Nonetheless, any claim of *Garmon* or *Machinists* preemption founders on the rocks of the exception consistently carved out by the Supreme Court for state regulation of health and safety matters in the face of claimed NLRA or RLA preemption. *See, e.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20-22 (1987); *Metropolitan Life*, 471 U.S. at 756-58; *Brotherhood of R.R. Trainmen*, 318 U.S. at 7 (dictum that RLA does not preempt ``state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation"); *Missouri Pac. R.R. v. Norwood*, 283 U.S. 249, *modified*, 283 U.S. 809 (1931).

The plaintiffs mount two frontal attacks on the applicability of the safety exception, neither of which succeeds. First, the plaintiffs argue that 45 U.S.C. ' 431(a) reserves to the FRA alone the power to disturb collective-bargaining terms in the name of safety. Plaintiffs' Memorandum at 38-39. This overbroadly reads the statute. Second, the plaintiffs argue that Maine is attempting to regulate much more than safety, in that the disputed licensing provisions impair the railroads' negotiated right to move employees freely across state lines. Plaintiffs' Memorandum at 40-41. Conceding, for purposes of the

motion to dismiss, that Maine's scheme does directly interfere with these railroad rights, I can draw no inference that the challenged law is not a safety statute. The self-proclaimed purpose of Maine's enactment ``is to provide for the safety of property, railroad workers and the general public by requiring certain railroad personnel to demonstrate adequate training and competency." 32 M.R.S.A. ' 4140. The plaintiffs allege no facts from which to infer any other state purpose. Effects beyond the field of safety therefore appear to flow incidentally from, rather than alter, the purpose and nature of the state's action.

The plaintiffs rely on *Brotherhood of Locomotive Engineers v. Industrial Comm'n of Utah*, 604 F. Supp. 1417 (D. Utah 1985), to make their case of *Machinists*-type preemption. Plaintiffs' Memorandum at 39-44. That reliance is misplaced. The Utah decision is distinguishable in that it deals with a state age-discrimination statute, not a safety regulation. A fresh First Circuit opinion dealing with NLRA preemption, *Associated Builders & Contractors of Massachusetts/Rhode Island v. Massachusetts Water Resources Auth.*, No. 90-1392 (1st Cir. Oct. 24, 1990) (1990 WL 163312), also is distinguishable. *Associated Builders* concerned a statute designed in part to further the safety and health purpose of cleaning Boston Harbor. The First Circuit, reversing the lower court, ruled that the safety purpose did not shield the challenged state action from preemption:

> In effect, the [district] court held that this public purpose [harbor cleanup] sanitized its constitutional shortfalls. While we do not totally fault the court's efforts in this respect, nor disagree as to the importance of the Boston Harbor clean-up, it cannot be said that congressional concern for a uniform, national labor policy as embodied in the NLRA, is entitled to secondary deference.

Id. slip op. at 25. In *Associated Builders*, however, unlike in the instant case, the state directly regulated the bargaining and negotiating processes to effect its safety purposes. *Id.* at 17-18. The First Circuit distinguished this extreme intrusion from cases in which the state exercises ``its historic powers

over such traditionally local matters as public safety and order and the use of streets and highways." *Id.* at 18 (citations omitted). The plaintiffs simply fail to state a claim of intrusion of enough magnitude or directness to penetrate the safety-exception shield. Accordingly, I conclude that Count II fails to state a claim upon which relief can be granted.

C. Count IV: Undue Burden on Interstate Commerce

The defendants argue that the Maine Act is authorized by Congress and hence cannot by definition impose an undue burden on interstate commerce. Defendants' Memorandum at 20-21; *Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985); *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 213 (1983). For the reasons stated in discussing the 12(b)(6) motion to dismiss Count I, this contention fails. The statute on which the defendants rely, 45 U.S.C. ' 434, does not authorize Maine to enact the challenged Act. Congress therefore has not insulated Maine's Act from attack under the Commerce Clause, U.S. Const. art. I, ' 8, cl. 3.

The test whether state action impermissibly burdens interstate commerce has been enunciated by the Supreme Court as follows:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citation omitted). In application, the *Pike* test results in fact-laden, even statistical, inquiries into both the extent of burden on commerce and the

legitimacy of the state's countervailing interest. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671-75 (1981).

The First Amended Complaint alleges neither that the Maine Act fails to regulate evenhandedly nor that the Act's effects on commerce are anything other than incidental. The plaintiffs do attack the legitimacy of the state's interest, First Amended Complaint & 55, but do so in a conclusory fashion. I find this paragraph to be a ``bald assertion[]," the truth of which I decline to accept for purposes of this motion. *Chongris*, 811 F.2d at 37. Nonetheless, the plaintiffs state a claim under the second prong of the *Pike* test: that the burden is excessive in relation to putative local benefits. The factual allegations contained in && 22 and 54 of the First Amended Complaint, which I accept as true for purposes of this motion, permit inferences that the Act will require revision of operating procedures, First Amended Complaint & 53(a), may force the plaintiffs to change crews at the Maine border and build terminals to rework employee schedules and hiring practices, *id.* at & 53(b), may force the plaintiffs to relocate switching yards and restructure communications systems, *id.* at & 53(c), may force the plaintiffs to revise systems and schedules for inspection and relocate inspections sites, *id.* at & 53(d), and may expose the plaintiffs to conflicting state laws, *id.* at & 53(e). Hence, the plaintiffs conceivably could prove that the burdens of the Act outweigh the state's interests in its enactment. Count IV should survive the motion to dismiss.

D. Drug Testing: Counts I, II, III & IV

The plaintiffs contend that Maine's statutory scheme is void in its entirety because drug testing has been preempted by federal railroad-safety law. First Amended Complaint at && 41, 46, 51, 57. The defendants concede the preemption of drug testing but argue that such provisions are severable.

Defendants' Memorandum at 15 n.8. The standard for determining severability, as articulated by the Supreme Court, is as follows:

> ``Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law."

Buckley v. Valeo, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)).

The Maine Act contains not a single word about drug testing. The offending provision, instead, is found in agency regulations. Acting pursuant to its authority under 32 M.R.S.A. ' 4147(2), the Board adopted a rule under which applicants for licenses are required, *inter alia*, to ``have passed to the approval of the Board a physical exam which includes a drug test, pursuant to the standards set forth in 49 CFR Part 219, within one year of passage of the written exam. . . ." Me. Dep't of Professional & Fin. Regulations, Bd. of Licensure of R.R. Personnel, ch. 2 ' I(B), Exh. I to Defendants' Memorandum. This drug-testing requirement constitutes but part of one sentence amid 12 pages of Board regulations. It no longer is being enforced by the state. Defendants' Memorandum at 15 n.8. I refuse to accept the truth of the plaintiffs' conclusory allegation that the Act ``was intended by the Maine Legislature to establish a consolidated mechanism whereby the state could regulate the qualification and licensure of railroad employees, including testing such employees for drug use. . . ." First Amended Complaint && 41, 46, 51, 57. The Maine legislature chose not to incorporate drug testing into the Act. The plaintiffs allege no facts from which I can find it ``evident" that the Legislature or the Board would not have enacted the entire licensing scheme but for the drug-testing regulation.[7] Finally, it is apparent that the offending provision easily can be stricken without

[7] If anything, the Maine legislature has evinced the opposite intent. *See, e.g.*, 1 M.R.S.A. ' 71(8),

affecting the balance of the Board's regulations. I accordingly recommend that the court grant the defendants' motion to dismiss, for failure to state a claim, claims in Counts I through IV that drug-testing preemption voids the entire Act.

III. JUDGMENT ON THE PLEADINGS

The defendants' remaining motion, for judgment on the pleadings under Fed. R. Civ. P. 12(c), is disposed of quickly. Judgment on the pleadings should be granted only when the parties dispute no issues of material fact and when the movant is entitled to judgment as a matter of law. *Lovell v. One Bancorp*, 690 F. Supp. 1090, 1096 (D. Me. 1988), *appeal dismissed*, 878 F.2d 10 (1st Cir. 1989); 5A Wright & Miller ' 1367 at 510. For the reasons outlined above in considering the defendants' motion to dismiss Count I, the defendants are not entitled to judgment as a matter of law as to federal railroad-safety preemption. Nor should the defendants be allowed judgment on the pleadings as to Count IV. Questions of undue burden on interstate commerce are inherently fact-laden. The defendants dispute the material facts that form the heart of the plaintiffs' claim of undue burden. Answer at && 53, 55. Count IV thus is ill-suited to resolution by means of judgment on the pleadings. Accordingly, I recommend denial of the defendants' motion for judgment on the pleadings.

IV. CONCLUSION

For the foregoing reasons, I hereby recommend that the court ***GRANT*** the defendants' motion to dismiss claims of Railway Labor Act preemption in Count III for lack of subject-matter jurisdiction; ***GRANT*** the motion to dismiss claims of Railway Labor Act preemption in Count II for

---

providing that invalid Maine provisions should be construed as severable.

failure to state a claim; ***GRANT*** the motion to dismiss, for failure to state a claim, the claims in Counts I through IV that drug-testing preemption voids the entire Act; and ***DENY*** the defendants' motion to dismiss as to the plaintiffs' remaining claims. Finally, I recommend that the court ***DENY*** the defendants' motion for judgment on the pleadings.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 4th day of December, 1990.

_____

David M. Cohen
United States Magistrate